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In the Supreme Court of the United States

OCTOBER TERM 1958

No. 957
CIVIL

BLANCHE DICK
Petitioner

vs.

NEW YORK LIFE INSURANCE COMPANY, A CORPORATION
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HAROLD W. BANGERT
Fargo, North Dakota
(Counsel of Record)
NORMAN G. TENNESON
Fargo, North Dakota
Counsel for Respondent

Hayward Court Brief Printing Company, Minneapolis 15, Minnesota

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STATEMENT OF THE CASE

The petitioner's statement of the case is incomplete. It omits certain very material facts which were developed at the trial. Hence this supplementary statement is submitted. The petitioner, Blanche Dick, was beneficiary of two life insurance policies issued by the respondent to her husband, William Dick. Both policies provided for double indemnity benefits in the event of accidental death. The single indemnity benefits were paid after commencement of suit, leaving the only issue for trial the right to recover the double indemnity benefits (R. 40, 48).

Petitioner alleged and respondent denied that the insured's death "resulted directly, and independently of all other

causes, from bodily injury effected solely through external, violent and accidental means", as limited and defined in the double indemnity provisions of both policies. As an affirmative defense, respondent alleged that the death of the insured resulted from suicide or self-destruction, making applicable the policy provisions that double indemnity benefits were not payable if death resulted from "self-destruction, whether sane or insane" (R. 7).

The action was tried to a jury resulting in a verdict in favor of petitioner for $7,500.00 (R. 49).

The insured's death occurred on January 20, 1955. His body was discovered by his wife when she entered the barn to call him. Receiving no answer, she entered the little silage shed between the barn and silo (Pl. Ex. 7; R. 11). It was then between 10:30 and 11:00 a.m. She saw her husband in the shed, lying on his back with his feet facing the south or outer door of the silo. She observed the wound on his head and knew he was dead. His double-barreled shotgun was lying near the body. He was dressed in blue overalls and jacket and had gloves on (R. 8, 9, 10).

Mrs. Dick called George Dick, a brother, who went to the silo shed and looked in. The deceased's left foot was on the floor and his right cocked against a 2 x 4 east of the south door. His forehead and eyes were completely gone. Defendants's Exhibit 11 (R. 15) is a picture posed by George Dick showing the location of the deceased's body in the position it was lying when he saw it. The gun, which was a double-barrel 12-gauge shotgun with two trigers, one in back of the other, was lying about 3 feet from the body with the butt near the feet and the barrel alongside the head. The body was clothed in a blue bib overall,

yellow flannel gloves, and work jacket with a zipper (R. 13, 14).

He found a concentration of shot pellets in the northwest corner of the shed and shot marks in the southeast corner on the east wall, south of the door, 3 or 4 feet from the floor. Pieces of human flesh were spattered about, mostly on the south door and above on the roof (R. 13).

The decedent's gun was usually kept in the barn. He had gone hunting every fall since 1926 for pheasants, deer, ducks and geese, and on these trips used the shotgun found near the body. He was experienced and careful in the use of firearms (R. 9, 10, 14).

Mr. Dick was very seldom a moody man. If he had anything on his chest, he would get it off and forget about it. These moody intervals were not frequent (R. 13, 14).

Mr. Noice, the County Sheriff, arrived at the farm about 11:00 a.m. He observed what he believed to be powder burns about an inch above the decedent's left ear. The gun was about 18 inches from the body with the stock toward the feet and the barrel along the body. The end of the muzzle was at about the chest. He took possession of the gun. It was a 12-gauge double-barrel Stevens gun with two triggers, placed one ahead of the other. The front trigger fires the right barrel and the rear trigger the left barrel. It weighed about 7 pounds. There is a safety device located on top of the stock behind the barrels and behind the device which breaks the gun. Before the gun can be fired, the safety device must be released by pushing the button ahead. It would not fire otherwise (R. 18, 19).

While in the shed, the Sheriff picked up the gun. It was dry and clean. He broke it and found two discharged 12-gauge shells in the chambers, which he removed. He observed a screw driver 8 to 10 inches long lying to the left

of the gun barrel and about 8 to 10 inches from it (R. 20).

The Sheriff made numerous tests with the gun to see if it would fire by jarring, pounding, or dropping it. All these tests were made with the gun off safe. In no instance did the triggers fire during these tests. They were made in the basement of the Courthouse. The gun was held with the muzzle pointing toward the ground and dropped a distance of about 10 inches to a board. This test was made about 10 times. The gun was then held with the butt about 10 inches from the floor and dropped to a board. This test was made 8 or 10 times. Next, the gun was placed in normal shooting position against the right shoulder with the barrel in the Sheriff's left hand and the stock in his right hand. He struck it against the board 3 or 4 times. The butt was placed on the floor and the barrel allowed to fall on a board (R. 19, 20). Tests of the trigger pull were also made by the Sheriff with a spring scale. It required approximately 7 pounds pull to fire the triggers. This test was made twice with both triggers, with the same result (R. 19, 20, 22).

After the body was removed to the funeral parlors, the Sheriff observed for the first time a wound on the left side of the decedent's body. It was about 5 inches long, pear-shaped and grazed the ribs. Defendant's Exhibit 17 (R. 25) shows the wound. The photograph was taken about two hours after the body was brought to the funeral home (R. 21, 22).

Dr. Veitch, the County Coroner, accompanied the Sheriff to the Dick farm and made an investigation as part of his official duties. He stated that the decedent's forehead and eyes were gone. The bone and tissue in front of the ears were gone, with the brain contents in plain sight. There was some red meat tissue or blood spatter on the south door and also on the north wall, mostly on the

upper half, with the area of greatest concentration on the south door (R. 23, 24).

About an hour and a half after he was at the farm, he examined the body in the funeral home when the clothing had been removed. He found another wound in the chest. It was a furrow type on the left lateral chest wall, extending about 5½ inches in length. The top was about 2½ to 3 inches below the left nipple with the greatest width about 2½ inches (R. 24).

He testified the wound to the head caused immediate death. The chest wound did not do so. It would have eventually caused death within one day to two weeks. The chest wound was terrifically painful, but did not result in loss of consciousness. Its chief consequence would be pain. The deceased would have the capacity to pull the trigger of a shotgun after receiving the chest wound (R. 26).

When he examined the body in the funeral parlor, the doctor observed definite powder marks on the skin of the left forehead in front of the ear. There was a high concentration of a powder burn extending a half inch to an inch (R. 30).

As a physician, he attended the deceased 8 times between September 13, 1954 and December 30, 1954. Mr. Dick had a mild to moderate non-specific prostatitis, was tired and felt pepless. He was put on sulpha therapy and received hormone injections each time after the first visit to the doctor. His illness did not prevent him from doing farm work. He would do it in spite of the misery he was having (R. 30, 31).

Dr. Veitch completed and signed Defendant's Exhibit 9 (R. 35), in connection with petitioner's claim for benefits under the policies. It shows death was due to "Suicide".

A firearms expert testified that when fired at close

range, the burning powders and gases from guns leave marks called powder burns. He found powder burns on the fabric of the decedent's outer jacket. These marks were at the holes toward the front of the jacket, and there were none at the hole to the rear. These burns were about an inch on each side of the top and bottom of the front hole. The direction of the shot charge, according to the holes present in the jacket, was front to rear (R. 32).

An inquest on the death of William Dick was held by a coroner's jury on January 28, 1955. A verdict of "suicide" was returned. The verdict was annulled and set aside by order of the District Court of Ransom County, North Dakota, on May 19, 1955, for want of compliance with statutory provisions regarding the time and manner of impanelling and administering the oath to the jury (R. 34).

ARGUMENT

I.

No denial of trial by jury.

The constitutional ground asserted by petitioner is that the decision of the Court of Appeals which set aside the verdict of the jury and dismissed the action, in effect deprived her of a trial by jury, contrary to the Seventh Amendment to the Constitution. The action was originally commenced in state court and was removed to the Federal Court by respondent because of diversity of citizenship. A jury trial was demanded and the case was tried before a jury. At the conclusion of the evidence, the respondent made a motion for a directed verdict, which was denied by the trial court (R. 38). The jury returned a verdict for petitioner. Respondent then moved to set aside the verdict

in accordance with its motion for a directed verdict, which was also denied by the trial court (R. 50-53). Appeal was then taken by the respondent to the Court of Appeals. That court, after reviewing the record, set aside the verdict and dismissed the action.

It is apparent that petitioner was not denied a trial by jury. The Court of Appeals held that the facts and circumstances surrounding the death of the insured could not be reconciled with any reasonable theory of accidental injury. Under the evidence, that court held that there was no question of fact for the jury and that petitioner had not made out a case. What petitioner is really contending for here is that the appellate court must accept the jury finding, and has no right to review the sufficiency of the evidence. A similar contention was made in *Galloway v. United States,* 319 U. S. 372, 87 L. Ed. 1458, 63 S. Ct. 1077. This was a suit on a contract of war risk insurance to recover total disability benefits. At the close of the evidence the District Court granted the motion for a directed verdict, which was affirmed by the Court of Appeals. Both courts held the evidence legally insufficient to sustain a verdict for petitioner. This court, in an opinion by Justice Rutledge, said:

> "If the intention is to claim generally that the Amendment (7th) deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century. More recently the practice has been approved explicitly in the promulgation of the Federal Rules of Civil Procedure. Cf. Rule 50; Berry v. United States, 312 U. S. 450, 85 L. Ed. 945, 61 S. Ct. 637. The objection therefore comes too late."
>
> 319 U. S. 389, 87 L. Ed. 1470.

The ruling by the District Court or the Court of Appeals, where a review of the facts is sought by a motion for directed verdict at the close of all the evidence, presents a question of law. No denial of trial by jury is involved where the court exercises its inherent right to pass upon the sufficiency of the evidence. This practice is so well established that no extended argument is necessary. Mr. Justice Frankfurter has said:

> "Any notion that the practice of directing verdicts offends the Seventh Amendment was laid to rest in Galloway v. United States, 319 U. S. 372, 87 L. Ed. 1458, 63 S. Ct. 1077."
>
> Footnote 11. *Rogers v. Missouri P. R. Co.*, 352 U. S. 541, 1 L. Ed. 2d 530, (Separate opinion).

II.

Court of Appeals followed state law.

It is asserted by petitioner that the Court of Appeals refused to follow the established North Dakota law in cases of this character where the ultimate question is whether the insured's death was accidental or suicidal. An examination of the appellate court's opinion clearly discloses that the court considered the policies to be North Dakota contracts and that the substantive law of that state was applicable, citing *Erie Railroad Co. v. Tompkins*, 304 U. S. 64.

The most recent holding of the North Dakota Supreme Court is *Svihovec v. Woodmen Acc. Co.*, 69 N. D. 259, 285 N. W. 447. The Court of Appeals in passing upon the question of whether the verdict should stand, expressly refers to the *Svihovec* case and applies the rule there stated.

> "The Supreme Court of North Dakota has held that proof of death by gunshot wound plus the presumption of accidental death makes a prima facie case

that death was accidental, and 'that a verdict founded upon such proof and presumption would not be set aside unless the facts and circumstances surrounding the death could not be reconciled with any reasonable theory of accidental or non-intentional injury.' Svihovec v. Woodmen Accident Co., 69 N. D. 259, 285 N. W. 447, 449.

"If the facts and circumstances surrounding the death of the insured can be reconciled with any reasonable theory of accidental injury the judgment appealed from should be affirmed, but if they cannot the judgment should be reversed."

Petition for Writ of Certiorari, p. 16.

The decisive factual elements which led Circuit Judge Sanborn to reverse the judgment are set out in the two following paragraphs quoted from the opinion:

"One can believe that even an experienced hunter might accidentally shoot himself once, but the asserted theory that he could accidentally shoot himself first with one barrel and then with the other stretches credulity beyond the breaking point.

"Our conclusion is that the infliction of two wounds in succession, one in the left side in close proximity to the heart, and the other in the head, cannot be reconciled with any reasonable theory of accident, and that, under the evidence, the question whether the death was accidental was not a question of fact for the jury. Compare, Burkett v. New York Life Ins. Co., 5 Cir., 56 F. 2d 105, and Svihovec v. Woodmen Accident Co., supra."

Petition for Writ of Certiorari, p. 16.

In weighing the sufficiency of the evidence, the appellate court gave petitioner the benefit of all reasonable inferences which could be drawn from the evidence viewed in the aspect most favorable to her, but was forced to the

conclusion that the verdict could not stand. To grant the writ would be asking this court to go over the same ground so carefully and thoroughly discussed and analyzed in the opinion of the court below.

III.

No public question involved.

Does this case raise issues important enough for this court's consideration and adjudication? Petitioner concedes that writs of certiorari are sparingly granted. A review is granted only where there are "special and important reasons therefor". Rule 19, Supreme Court Rules. It is submitted that the issues in this case are not of general importance to either the public or other citizens of North Dakota to justify the exercise of this court's jurisdiction. It is essentially and basically private litigation between the beneficiary of life insurance policies and an insurance company. Concededly the outcome of the case is important to the parties. Such litigation is not uncommon and each case involves different factual elements so that there is no issue of law of controlling importance to be laid down which will be applicable to subsequent litigation. Should the practice be established of permitting a review of cases of a similar nature, further burdens would be imposed upon the Supreme Court to the detriment of cases of general public importance.

The effect of granting the writ would require that the Supreme Court review a case in which the sole question is the sufficiency of the evidence for submission to the jury. A second appellate court will then be required to review the evidence and the specific factual situation developed in the trial court and carefully reviewed in the Court of Ap-

peals. It has been well said that there must be an end to litigation. The words of Mr. Justice Frankfurter in the *Rogers* case, *supra,* that the course of argument and briefs on the merits "may reveal more clearly that the only thing in controversy is an appraisal of facts on which this court is being asked to make a second guess, to substitute its assessment of the testimony for that of the court below," 352 U. S. 528, 1 L. Ed. 2d 522, are particularly applicable to this case.

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this court, and that the petition for a writ of certiorari should be denied.

Dated June 2, 1958.

Respectfully submitted,

HAROLD W. BANGERT
Fargo, North Dakota
(Counsel of Record)
NORMAN G. TENNESON
Fargo, North Dakota
Counsel for Respondent

Respondent's Brief on the Merits

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In the Supreme Court of the United States

BLANCHE DICK
Petitioner

vs.

NEW YORK LIFE INSURANCE COMPANY, A CORPORATION
Respondent

OCTOBER TERM, 1958

No. 58

PETITIONER'S BRIEF ON THE MERITS

PERSHING BOE
Fargo, North Dakota
(Counsel of Record)
DONALD C. HOLAND
Lisbon, North Dakota
PHILIP B. VOGEL

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BLANCHE DICK

Petitioner

VS.

NEW YORK LIFE INSURANCE COMPANY, A CORPORATION

Respondent

PETITIONER'S BRIEF ON THE MERITS

REFERENCE TO REPORTS

On June 23, 1958 the Supreme Court of the United States granted the petitioner's prayer that a Writ of Certiorari issue to review the judgment of the Eighth Circuit Court of Appeals entered and rendered against the petitioner on the 7th day of February, 1958. The granting of the petition is reported as case number 957 at 2 L. Ed. 2d 1369. The opinion of the Eighth Circuit Court of Appeals is reported as case number 15,760 at 252 F. 2d 43.

JURISDICTION OF THIS COURT

The petitioner relies upon the provisions of Amendment VII of the United States Constitution which preserves for her the right of trial by jury and *28 U. S. C. A.* No. 2101 and No. 2106 to sustain the jurisdiction of this court. The petition for Certiorari was timely filed on April 28, 1958 and Certiorari was granted on June 23, 1958.

CONSTITUTIONAL PROVISIONS

The constitutional provision involved is Amendment VII found in *U. S. C. A.*, Constitution, page 379. It reads as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the common law."

QUESTIONS PRESENTED FOR REVIEW

Denial of trial by jury.

Can the Circuit Court of Appeals deny Mrs. Dick, the petitioner, a trial by jury where there is evidence in the record consistent with accidental death, and where a jury has found that the death was not a suicide, and where the trial judge has refused to set aside the verdict of the jury?

Refusal to follow state law.

Did the Circuit Court of Appeals have the right to refuse to follow the North Dakota law which for more than 50 years has held that the question of whether a death is suicidal is for the jury where there is evidence in the record consistent with accidental death? In this case the opinion of the Circuit Court of Appeals acknowledges that there was such evidence.

A CONCISE STATEMENT OF THE CASE

William Dick was a 47 year old farmer living on his farm near Englevale, North Dakota. On January 20, 1955, he died as a result of two shots from an old double bar-

reled shot gun. Death occurred in a silo shed at about 10 a.m., while he was in the process of doing his chores. This lawsuit was brought by his wife in a North Dakota State Court for recovery of the double indemnity benefits payable under two life insurance policies issued to the decedent in 1944 and 1949.

Mr. Dick was a happy, well adjusted man in good health. His only known ailment was a form of mild to moderate non-specific prostatitis (R. 30), but this illness would not prevent him from doing his work. He was bright and cheerful and his doctor was satisfied with his progress (R. 31). He was a man of modest means with no financial problems. He left no will (R. 9).

The night before he died he took the time to help his 14 year old daughter with her General Science studies, explaining to her the intricacies of a transformer (R. 18). He slept soundly, ate a hearty breakfast, milked his cows, and had planned to help his neighbor make sausage (R. 8). He had said or done nothing to indicate that he contemplated suicide (R. 59).

Mr. Dick had commenced to feed his cattle at the outside feed troughs just north of the silo (Pl. Ex. 7, R. 11). It was his practice to put silage in the troughs, get a tub full of ground corn and then spread it over the silage (R. 13). The cattle had been fed silage (R. 17), but the tub filled with ground corn was found a couple of steps from the feed troughs on the barn side of the fence (R. 16).

Several months prior to his death Mr. Dick had trouble with vicious dogs. A few sheep were lost and quite a few were mangled (R. 16). A fox had been seen and a badger had been killed in the barn lot (R. 9). The gun was kept in the barn (R. 9). It was at least 28 years old (R. 10).

On at least one occasion the gun had discharged accidentally (R. 34-36).

Most of the feed lot was visible from the point near the feed troughs where the unemptied tub of ground corn was found. The most direct access to the feed lot was through the barn and the south door of the silo shed (Pl. Ex. 7, R. 11).

Mrs. Dick drove their daughter, Dorothy, to school that morning, and after returning in about half an hour she took care of various household chores which would have to be done before going to the neighbors to help make sausage as she and her husband had planned (R. 8). When Mr. Dick did not come to the house she went to the barn to look for him and found his body in the silo room near the south exit (Pl. Ex. 7, R. 11; Pl. Ex. 11, R. 15).

There was a sprinkle of silage on the floor and on the steps of the silo shed. It was wet and more or less frozen (R. 13). Mr. Dick was wearing a jacket that was zippered up. He was wearing heavy fleecy gloves (R. 22). There was no blood on the gloves or the gun.

There were two wounds. The wound along the chest was a grazing wound (R. 22). It was *not* pointed at the heart or any other vital organ. The second was a head wound and it caused instant death (R. 26).

A screwdriver was kept in the shed for the purpose of opening the door because the knob was off (R. 9). Mr. Dick would have used this screwdriver if he intended to go out the south door of the shed. The sheriff who investigated did not know the length of this screwdriver (R. 21), nor did the sheriff ever have the screwdriver in his possession so as to determine whether or not the gun could be fired by using the screwdriver.

SUMMARY OF ARGUMENT

1. Under *Erie v. Tompkins* the federal court was required to follow the North Dakota law.

2. Where there is evidence that is consistent with accidental death the case must be submitted to the jury under the laws of North Dakota.

3. In North Dakota the presumption against suicide has the weight of affirmative evidence.

4. Entirely apart from the presumption there are at least seven inferences that the jury was entitled to draw from the evidence and these pointed only to accidental death.

5. The inference of suicide can only be drawn from the fact that both barrels of the gun were fired. Actually the opposite inference may be drawn from the same fact.

ARGUMENT

The petitioner, Mrs. Dick, started this lawsuit in the North Dakota state court. The New York Life Insurance Company removed it to the federal court because $7,500 was involved and there was diversity of citizenship. The jury found that the death was not a suicide. The trial judge refused to overturn the verdict. The circuit court granted judgment for the insurance company.

There were obvious questions of fact involved in this lawsuit and the circuit court's decision has denied to the petitioner her right to trial by jury under Amendment VII of the United States Constitution.

The Federal Court was required to follow the North Dakota law.

There can be no question but that the Eighth Circuit Court of Appeals was bound to follow the North Dakota law. *Erie v. Tompkins,* 304 U. S. 64, 82 Law Ed. 1188 has made that amply clear and the Eighth Circuit Court has itself acknowledged this:

> "Since the policy is an Arkansas Contract the case is controlled by the law of that state. Erie Railroad Co. v. Tompkins, 304 U. S. 64. Whatever the law as to burden of proof may be in this type of case in other states, the instructions given by the court conform to the law of Arkansas. The settled law of that state is 'that proof of death of an insured from injuries received by him raises a presumption of accidental death, within the meaning of an insurance clause insuring against injury by external, violent, and accidental means, and this presumption will continue until overcome by affirmative proof to the contrary on the part of the insurer.' When suicide is the defense the burden of estabiishing this fact is upon the defendant. The plaintiff is not required to prove that the death of the insured did not result from suicide."
>
> *Aetna Life Ins. Co. v. Newbern* (C. C. A. 8, 1942), 127 F. 2d 171.

In North Dakota suicide cases must be submitted to the jury where there is evidence consistent with accidental death. In North Dakota the presumption against suicide has the weight of affirmative evidence.

The Circuit Court's decision is in conflict with *all* relevant decisions of the North Dakota Supreme Court. Its decision is on an important question of North Dakota law. The North Dakota Supreme Court has held for 50 years

that suicide cases are to be submitted to the jury where there is evidence consistent with accidental death. Its first decision was *Stevens v. Continental Casualty Co.* (N. D. 1903), 12 N. D. 463, 97 N. W. 862. The court said:

> "With the burden of proof upon the defendant to show that the insured died from injury intentionally inflicted, ought the judge to have instructed the jury that the burden was sustained as a matter of law? 'It is not often, where a party has the burden of proving a fact by the testimony of witnesses, that the jury can be required by the court to say that the fact is proved. They may disbelieve the witnesses. If the conclusion is to be reached by drawing inferences of fact from other facts agreed, ordinarily the jury alone can draw these inferences. It is only when no inferences are possible, except those which lead to one conclusion, that the jury can be required to find a proposition affirmatively established.' Anthony v. Accident Ass'n., 162 Mass. 354, 38 N. E. 973. That the person who shot the insured in this case intended to do so must not only be an inference arising from the facts proven, but any other inference must be excluded by the proofs."

That was the first North Dakota case on the subject. The second case was *Clemens v. Royal Neighbors of America* (N. D. 1905), 14 N. D. 116, 103 N. W. 402. In this case the insured talked to his religious advisor, wrote a note saying, "Bury me at Leonard. Kiss the children for me. Don't take this too hard." The lower court directed a verdict for the insurance company and the North Dakota Supreme Court held that this was proper.

> "The plaintiffs insist that these undisputed facts should have been submitted to the jury, to determine whether Clemens' death was caused by his own voluntary act or by other means. The presumption is that a death caused by unexplained means was not suicidal.

In the absence of proof, such death will be presumed to have been caused by accidental means. Stevens v. Continental Casualty Co., 12 N. D. 469, 97 N. W. 862, and cases cited. And the burden of proof is upon the insurer to show that death was caused in a manner or by means that exempt him from liability. Has the presumption of law that death was not caused by suicide been overcome by the defendant, as a matter of law? If so, the direction of a verdict was proper. If reasonable men, viewing these undisputed facts, might differ in their conclusions as to whether the deceased committed suicide, then the facts should have been submitted to the jury. *If there is no evidence in the record that can be said to be inconsistent with the conclusion of death by suicide, then the question was properly one for the court to direct the jury to find verdict for the defendant.* We think the facts all point to death by suicide, and are inconsistent with any other reasonable theory. If it be said that it might have been an accidental death, or one criminal by another, the note conclusively rebuts such possibility. The circumstances of meeting his employer, his shortage, and the impending exposure that must follow, the note, the position of the wound, the blood on the revolver and on the mirror, and that he was alone in the room, are sufficient facts, as a matter of law, to overcome the presumption against a death by suicidal means. A verdict for the plaintiff under such circumstances could not be sustained, and would be without any evidence to support it." (Emphasis supplied.)

Clemens v. Royal Neighbors (N. D. 1905), 14 N. D. 116, 103 N. W. 402.

The third North Dakota case on the subject is *Paulsen v. Modern Woodmen of America* (N. D. 1911), 130 N. W. 231. The insured was arrested for a violation of a criminal statute. That night while lying in his bed he apparently took strychnine and died. There was no evidence that anyone other than the decedent could have administer-

ed the poison. The court sustained the judgment against the insurance company and said:

> "The vital question is, therefore, whether, as appellant contends, the circumstances conclusively establish suicide, as a matter of law. If this question must be answered in the affirmative, it follows as a necessary conclusion that the court erred in submitting the case to the jury. In deciding this question we are controlled by certain well established rules. The presumption is that Paulsen did not commit suicide, but that the strychnine was administered through accident or mistake. And the burden is on defendant to overcome such presumption. Ordinarily the question of what inferences are deducible from the evidence is peculiarly a question for the jury, and it is only in rare instances that the court is justified in determining such question as a matter of law. If it can be said that reasonable men may fairly differ as to the inferences to be deduced from all the circumstances disclosed, it is a proper case for the jury. As said by the Supreme Judicial Court of Massachusetts: 'It is not often, where a party has the burden of proving a fact by the testimony of witnesses, that the jury can be required by the court to say that the fact is proved. They may disbelieve the witnesses. If the conclusion is to be reached by drawing inferences of fact from other facts agreed, ordinarily the jury alone can draw these inferences. It is only when no inferences are possible, except those which lead to one conclusion, that the jury can be required to find a proposition affirmatively established.' Anthony v. Accident Ass'n., 162 Mass. 354, 38 N. E. 973.
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> "Applying the foregoing rules or tests to the facts in the case at bar we are constrained to hold, as did the trial court, that the question was one of fact for the jury, and not one of law for the court, to decide. While, if we were the triers of the facts, our decision might have been contrary to that of the jury, we are not prepared to say that but one conclusion or in-

ference could properly be deduced from the facts. This being true our duty is plain under the law."

Paulsen v. Modern Woodmen of America (N. D. 1911), 130 N. W. 231.

The fourth North Dakota case and the most recent holding is *Svihovec v. Woodmen Acc. Co.* (N. D. 1939), 69 N. D. 259, 285 N. W. 447. By 1939 most of the jurisdictions throughout the United States had abandoned the presumption rule as it existed in North Dakota and counsel for the insurance company argued for a new and more modern rule that would deny to the presumption the weight of affirmative evidence. The North Dakota Court refused to accept this modern rule and said:

"The rule announced by this court in Stevens v. Continental Casualty Co., 12 N. D. 463, 97 N. W. 862, gave to the presumption in favor of accidental death the weight of affirmative evidence. It was there held that proof of death by gunshot wound, aided by this presumption, was sufficient to establish a prima facie case of accidental death, and that a verdict founded upon such proof and presumption would not be set aside unless the facts and circumstances surrounding the death could not be reconciled with any reasonable theory of accidental or nonintentional injury. Defendant contends for a modification of this rule and its brief presents a scholarly and persuasive argument in support of that contention. Despite the logic of defendant's argument and the weight of the authority presented to support it, we feel we must adhere to the rule above set forth. That rule was affirmed by this court in Clemens v. Royal Neighbors, 14 N. D. 116, and it follows as a fair construction of sections 7934 and 7936 Compiled Laws of North Dakota, 1913."

Svihovec v. Woodmen Acc. Co. (N. D. 1939), 285 N. W. 447.

These four cases represent the North Dakota law on this subject. This has been the law in North Dakota for more than 50 years. At no time, either in the district court or in the circuit court did the insurance company cite a single North Dakota case holding that this case should not have been submitted to the jury. It was the position of the insurance company that the North Dakota rule was not applicable and that the court should apply what they described as "the modern rule and the best rule." The decision of the 8th Circuit is clearly in conflict with the North Dakota law. Under *Erie v. Tompkins*, 304 U. S. 64, 82 Law Ed. 1188 it was required to follow that law and this it did not do.

There is ample evidence in the record of accidental death.

This is not a case where the widow must rely upon the presumption alone and where all of the other evidence points to suicide. Even if the presumption could be cast aside there were at least seven established facts that indicated to reasonable men and women that this death was accidental.

1. There was absolutely no motive for suicide and none could be inferred from the evidence.

2. On the evening before he died Mr. Dick spent the hours quietly with his family, helping his 14 year old daughter with her general science studies.

3. He was a happy, jolly man who was free of worries and regrets.

4. He had been troubled with vicious dogs and other wild animals and so he kept his 28 year old shotgun in the barn. Just before his death, and while he was feeding his

cattle, he carried to the cattle feed troughs a tub of ground corn. Normally he would have lifted this over the fence and put it into the troughs. On the morning of his death he put it down, across the fence from the cattle, and unemptied. The inference is that he was interrupted in his labors and went to the barn to get his gun.

5. He could have slipped because the steps into the silo shed were wet and more or less frozen.

6. The gun was old and it had discharged accidentally before.

7. He was wearing heavy, fleecy gloves a finger of which could hardly be forced into the trigger guard of the gun. There was no blood on the gloves. His heavy winter jacket was zippered up. The only evidence of suicide in the record consists of the fact that both shots from the two barrels were fired. While the inference of suicide may be drawn from that one fact the opposite inference may also be drawn from the same fact, for if this were a suicide, then necessarily the jury would have to conclude:

(a) That Mr. Dick on the spur of the moment decided to kill himself.

(b) That he aimed his first shot at his heart and did not even take off his jacket to see where his gun was pointed.

(c) That his shot came nowhere near his heart but did inflict upon him a painful wound that would eventually have caused his death.

(d) That he did not stop to examine his first wound to see if it was mortal (because there was no blood on the gloves).

(e) That he would then have the strength and the will and the power to pull himself together and in some unknown manner blow off the top of his head with the second shot.

(f) That he would do all of these things while wearing heavy, fleecy gloves that could hardly be forced into the gun's trigger guard.

Perhaps the jury had the right to draw speculative inferences of this kind but they were not compelled to draw them.

We submit that all of the seven facts above set forth were amply established by the evidence. Indeed they were not contradicted. The circuit court in its decision acknowledges that there was evidence of accidental death for the court says:

> "The improbability of his being able to pull the triggers with bulky gloves on is offset by the strong probability that the screwdriver was used to push the triggers, and that he could not otherwise have reached the triggers so as to inflict the wounds he received."

Here the court is itself weighing the evidence. The screwdriver was of no importance whatsoever to the jury. It was not important enough for the investigating officer to even pick up or measure after the death. The circuit court has drawn a speculative inference from the screwdriver which the jury did not and was not compelled to draw.

CONCLUSION

The decision of the Circuit Court of Appeals has denied to Mrs. Dick her right to a trial by jury under Amendment VII of the United States Constitution. That decision is in

conflict with *all* relevant decisions of the North Dakota Supreme Court. This case is of importance to all practitioners in North Dakota. We submit that the petitioner is entitled to judgment as ordered by the North Dakota District Court and for her costs.

Respectfully submitted,

PERSHING BOE
Fargo, North Dakota
(Counsel of Record)
DONALD C. HOLAND
Lisbon, North Dakota
PHILIP B. VOGEL
Fargo, North Dakota
Attorneys for Petitioner